

RECENT DEVELOPMENTS

REPRESENTATION OF CLAIMANTS IN WORKMEN'S COMPENSATION HELD TO BE THE PRACTICE OF LAW

In re Brown, Weiss & Wohl
175 Ohio St. 149, 192 N.E.2d 54 (1963)

A court-appointed committee instituted an action in Cuyahoga County alleging that the respondents were engaged in the unauthorized practice of law and seeking a restraining order. The common pleas court found that respondents held themselves out as being qualified to render advice concerning the Industrial Commission and Workmen's Compensation Bureau of Ohio, and that they or their representatives appeared before those bodies. The court held that since such acts constituted the practice of law for which respondents were not qualified, they were engaged in the unauthorized practice of law.¹ The court of appeals² and the Supreme Court³ of Ohio affirmed the decision.

In paragraph three of the syllabus the court stated that only attorneys could advise claimants under the workmen's compensation laws of Ohio.⁴ After stating that it was important that the public be protected from being induced to pay for the services of non-lawyers at all stages of the proceedings, the court modified the trial court's decree from enjoining such actions to enjoining such actions for a fee.

Judge Gibson, while concurring in part, dissented from the holding of the court in paragraph three of the syllabus. After detailing the various stages in the processing of workmen's compensation claims and setting forth statistics as to the number of claims which reach the various stages, he concluded that the interest of the public would be fairly protected if actions subsequent to the original decision of the Administrator of the Bureau of Workmen's Compensation, or subsequent to action on the application for rehearing, were held to be the practice of law. Finally, he questions three aspects of the majority opinion: (1) the relevance of charging a fee to protection of the public; (2) the limitation of the

¹ *In re Brown, Weiss & Wohl*, 92 Ohio L. Abs. 257, 193 N.E.2d 738 (C.P. 1962).

² *In re Brown, Weiss & Wohl*, 92 Ohio L. Abs. 493, 185 N.E.2d 489 (Ct. App. 1962).

³ *In re Brown, Weiss & Wohl*, 175 Ohio St. 149, 192 N.E.2d 54 (1963).

⁴ Paragraph three of the syllabus states:

No person other than an attorney in good standing may hold himself out as being qualified to render service to those who may have claims for compensation arising under the Workmen's Compensation laws of Ohio or as being able to render services in the preparation and presentation of such claims nor may such person render such advice or services if a fee for such advice or services is to be received from or charged against the one having such a claim.

definition of the practice of law in this instance to those representing claimants; and (3) the nullification of certain sections of the Ohio Revised Code respecting the authority of the Industrial Commission to regulate those who appear before it.

The procedures in processing a claim for workmen's compensation are controlled by the appropriate statutes which were revised in 1955.⁵ The first hearing is before a deputy administrator.⁶ This hearing is largely informal and in many cases neither side is represented.⁷ Upon decision, either party may file for reconsideration by the administrator or bring an appeal to the regional board of review.⁸ If the request for reconsideration is filed, appeal to the board of review may be taken subsequent to the administrator's decision on the request for reconsideration.⁹

The hearing before the board of review is more formal, and the administrator is represented by counsel at the hearing.¹⁰ After a decision is reached by this board, appeal may be had by the claimant, the employer, or the administrator to the Industrial Commission.¹¹ A hearing by the Industrial Commission is granted at the discretion of the Commission.¹² Finally, appeal may be taken from the Commission's determination to the common pleas court where the matter is heard *de novo*.¹³

The statutes permit the claimant to appeal directly to the common pleas court from the administrator's decision on the application for reconsideration.¹⁴ Apparently this procedure has never been followed by claimants.¹⁵ The court held that this entire procedure and advice on filling out the pertinent forms were what constituted the practice of law.

The problem of defining the practice of law is one that has troubled courts considerably. In attempting to arrive at some workable definition the Supreme Court of South Carolina, around the turn of the century, stated:

According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings, and the management of such actions and proceedings before judges and courts, and, in addition, conveyancing, the preparation of

⁵ For a discussion of the procedures under the new statutes see: Beall & Beall, "Workmen's Compensation in Ohio: The Procedure and Practice," 19 Ohio St. L.J. 591 (1958); DeLeone & Alloway, "The New Ohio Workmen's Compensation Act," 16 Ohio St. L.J. 515 (1955).

⁶ Ohio Rev. Code Ann. § 4123.515 (Page Supp. 1963).

⁷ *In re Brown, Weiss & Wohl*, *supra* note 3, at 156, 192 N.E.2d at 60.

⁸ Ohio Rev. Code Ann. § 4123.516 (Page Supp. 1963).

⁹ *Ibid.*

¹⁰ Ohio Rev. Code Ann. § 4123.518 (Page Supp. 1963).

¹¹ Ohio Rev. Code Ann. § 4123.516 (Page Supp. 1963).

¹² *Ibid.*

¹³ Ohio Rev. Code Ann. § 4123.519 (Page Supp. 1963).

¹⁴ *Ibid.*

¹⁵ *In re Brown, Weiss & Wohl*, *supra* note 3, at 157, 192 N.E.2d at 60.

legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law.¹⁶

The administrative agency, often functioning in a quasi-judicial fashion, created a problem since such agency was not a court as such. The Ohio Supreme Court first ruled on whether work in the area of workmen's compensation was the practice of law in *Goodman v. Beall*.¹⁷ The procedure at that time was considerably different, with the record before the Industrial Commission constituting the basis for appeal to the common pleas court. The court held that the original proceedings did not constitute the practice of law but that the rehearing record had to be conducted by an attorney since it formed the basis for the appeal to the common pleas court.¹⁸

The Ohio position was not generally followed by other states which faced the problem.¹⁹ For example, in *People ex rel. Chicago Bar Ass'n. v. Goodman*,²⁰ the court, by a 4-3 margin, held that appearance before the Industrial Commission was the practice of law. *Goodman v. Beall*²¹ is carefully distinguished by the majority. The dissent maintained that *Beall*²² should be followed since most of the procedures were more or less automatic.

Most courts have taken the position that work in this area is the practice of law and that while it is possible for a legislature through its agency, the Industrial Commission, to set up rules concerning the qualifications required of those who will appear before it in a representative capacity, those rules cannot usurp the court's functions of regulating the practice of law.²³ Thus the rules may supplement the court's initial re-

¹⁶ *In re Duncan*, 83 S.C. 186, 65 S.E. 210 (1909). For a general discussion of what constitutes the practice of law see Annots., 111 A.L.R. 19 (1937), 125 A.L.R. 1173, (1940), 151 A.L.R. 781 (1944).

¹⁷ 130 Ohio St. 427, 200 N.E. 470 (1936).

¹⁸ In discussing the basic procedures, the court in *Goodman v. Beall*, 130 Ohio St. 427, 430, 200 N.E. 470, 472 (1936) stated:

Since the inception of the Workmen's Compensation Act it has been common practice for laymen to assist an injured or diseased workman or his dependents in the submission of a claim. Often this is done as an accommodation by representatives of the employer or by representatives of an organization to which a claimant may belong, and such usually simple services are for the most part performed in an expeditious and satisfactory manner. In our judgment this is not the practice of law.

¹⁹ In *Eagle Indem. Co. v. Industrial Acc. Comm'n*, 217 Cal. 244, 18 P.2d 341 (1933), however, the California Supreme Court took the position that the legislature had, by statute, created an exception to the court's control of the practice of law, and that a layman could therefore collect his fee for work before the commission.

²⁰ 366 Ill. 346, 8 N.E.2d 941 (1937).

²¹ *Supra* note 18.

²² *Ibid.*

²³ *People ex rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E.2d 941 (1937); *Hoffmeister v. Tod*, 349 S.W.2d 5 (Mo. 1961); *State ex rel. Daniel v.*

quirements for eligibility to practice law but may not replace them. The decision in *In re Brown, Weiss & Wohl* represents an effort to bring Ohio in line with these decisions.²⁴

As Judge Gibson indicates in his opinion, there are several aspects of the court's decision in *In re Brown* which deserve close scrutiny. The court, by modifying the injunction to provide that such actions must be for a fee, creates a strong implication that charging a fee, at least in the area of workmen's compensation, is essential for such actions to be considered the practice of law. In a period when public impression of members of the bar may be that the interest of attorneys in the rights of individuals is second only to their interest in collecting a fee, this holding does nothing to refute such an impression, and, in fact, underscores the emphasis on fee rather than on advice.

Although there is some authority in which consideration is an element in the definition of the practice of law,²⁵ the better reasoned cases hold that consideration or the lack of it is not determinative of the issue of whether a party is engaged in the unauthorized practice of law. For example, in *Hoffmeister v. Tod*,²⁶ where a layman involved in representing individuals on workmen's compensation claims was held to be engaged in the unauthorized practice of law, the court stated: "We have held that Tod received consideration, but we also hold that, on this record, he was illegally practicing law, whether he received consideration therefor or not."²⁷ After holding that a person can be practicing law without charging a fee, the court in *In re Baker*²⁸ explains:

Wells, 191 S.C. 468, 5 S.E.2d 181 (1939); West Va. State Bar v. Early, 144 W.Va. 504, 109 S.E.2d 420 (1959). See also *McMillen v. McCahan*, 83 Ohio L. Abs. 167, 167 N.E.2d 541 (C.P. 1960), a decision out of Stark County where the court holds laymen in workmen's compensation matters are engaged in the practice of law and enjoins such action. The court makes no mention of *Goodman v. Beall*, *supra* note 18, but cites *People ex rel. Chicago Bar Ass'n. v. Goodman*, *supra*.

²⁴ The United States Supreme Court apparently accepts broad regulation of the practice of law by the state courts, even before federal agencies, unless Congress has delegated the authority to the federal agency. See *Sperry v. Florida*, 373 U.S. 379 (1963).

²⁵ See, e.g., *Clark v. Austin*, 340 Mo. 467, 478, 101 S.W.2d 977, 982 (1937):

It will be sufficient for present purposes to say that one is engaged in the practice of law when he, for a valuable consideration, engages in the business of advising persons, firms, associations, or corporations as to their rights under the law, or, appears in a representative capacity as an advocate in proceedings pending or prospective, before any court, commission, referee, board, body, committee or commission constituted by law or authorized to settle controversies, and there in such representative capacity, performs any act or acts for the purpose of obtaining or defending the rights of their clients under the law. (Emphasis added.)

²⁶ 349 S.W.2d 5 (Mo. 1961).

²⁷ *Hoffmeister v. Tod*, 349 S.W.2d 5, 17 (Mo. 1961). See also *People ex. rel. Attorney General v. Jersin*, 101 Colo. 406, 74 P.2d 668 (1937); *Idaho State Bar v. Meservy*, 80 Idaho 504, 355 P.2d 62 (1959); *Clark v. Reardon*, 231 Mo. App. 66, 104 S.W.2d 407 (1937); *In re Baker*, 8 N.J. 321, 85 A.2d 505 (1951).

²⁸ *Supra* note 27.

The soundness of this position is the more evident if it is borne in mind that the underlying purpose of regulating the practice of law is not so much to protect the public from having to pay fees to unqualified legal advisors as it is to protect the public against the often drastic and far reaching consequences of their inexpert legal advice.²⁹

If appearance before the Bureau of Workmen's Compensation and advice concerning the filing of claims constitute the practice of law, it is submitted that remuneration is irrelevant in determining whether a party is qualified to undertake such actions.

The court's decision prohibits laymen from representing claimants in workmen's compensation matters. However, when the employer disputes a claim, he is also represented at the hearings, and generally, this representation is by non-attorneys. It is conceded that the issue before the court was lay representation of claimants and that the court carefully pointed out the emphasis in the briefs that the court should avoid broad generalizations. Even so, the careful wording of the decision in this case so as not to prohibit lay representation on behalf of employers does create the paradoxical result that those representing claimants before the Bureau of Workmen's Compensation are practicing law, whereas those representing employers are not.

Further, the statutes setting up the requirements of the composition of the Industrial Commission and the office and duties of the Administrator of the Bureau of Workmen's Compensation and his administrative deputies do not require such individuals to be members of the bar.³⁰ The regional boards of review are required to have only one of the three members be an attorney.³¹ The administrative deputies, in presiding over the hearings of claims, are not bound by common law, statutory rules of evidence, or formal rules of procedure.³²

The impact of *In re Brown* is that the attorney representing the claimant before the bureau may present the matter for determination to a non-attorney who is not bound by the usual rules of evidence or formal rules of procedure and be opposed by a non-attorney representing the employer.

It is submitted that if representing claimants constitutes the practice of law, then representing employers does also. The functions of representation are the same; only the clients are different, and lay representation should not be permitted of either client. Further, it would seem that if such functions do constitute the practice of law, then those who determine

²⁹ *In re Baker*, *supra* note 27, at 339, 85 A.2d at 515. In *In re Brown*, Weiss & Wohl, *supra* note 3, the court's limitation to those cases where the representative charges a fee may in part be due to a brief filed amicus curia by the AFL-CIO informing the court of services performed by its members regarding workmen's compensation claims and urging that the court's decision not be so broad as to preclude those activities.

³⁰ Ohio Rev. Code Ann. §§ 4121.02, .12 (Page Supp. 1963).

³¹ Ohio Rev. Code Ann. § 4123.14 (Page Supp. 1963).

³² Ohio Rev. Code Ann. § 4123.515 (Page Supp. 1963).

the respective rights under workmen's compensation should be trained in the law as well, and the legislature should therefore consider modification of the statutory requirements of eligibility relevant to the pertinent offices.

In paragraph one of the syllabus the court holds: "Section 35, Article II of the Ohio Constitution, does not confer upon the Industrial Commission the authority to determine the qualifications of persons engaged in the practice of law before the Industrial Commission."³³ The statutory provisions setting up the Industrial Commission and the Bureau grant those bodies the power to regulate and discipline those who appear before them.³⁴ The effect of the first paragraph of the syllabus seems to be the removal of that power.

If such is the intent of the court, it goes beyond those other decisions which have held workmen's compensation to be the practice of law. Those decisions have held that the regulations of the Commission involved could supplement the basic requirements of the court regarding eligibility to practice law but could not replace them.³⁵ The Ohio decision seems to remove even this supplemental power. Such a position is not necessary to insure the court's control over the practice of law. If the court did not intend to assume such a severe position, it should avail itself of the earliest opportunity to make its position clear. *In re Brown* represents a step by the Ohio court toward judicial control of those who engage in workmen's compensation matters. Even if the court's position is maintained in the future, there is a definite need for the court to clarify its position as to who is subject to the ruling. If, however, the purpose of workmen's compensation is that "it assures every worker compensation for injuries or death arising out of and in the course of employment, backed by state law and state administration without necessity for recourse to lawsuits or employment of attorneys or payment of court costs,"³⁶ then the court's decision seems to run contrary to such purpose. The decision is, however, consistent with the purpose of having the court control the practice of law.

Is there a possible solution which adequately meets the needs of both interests? The solution proposed by Judge Gibson sets the pattern. If one defines the practice of law to include only those matters involved in cases going beyond the hearing of the deputy administrator, then the definition meets the basic purpose of workmen's compensation in the ninety-five percent of the cases in which there is little or no dispute. Only in cases where there is a real dispute warranting going beyond the basic procedures is it important to have the assistance of one trained in the law. And such importance, if it exists, is applicable equally to claimant, employer, and hearing officer. Such a definition would meet the purpose behind the law as well as the court's function of regulating the practice of law in those situations where there is a strongly disputed issue and incompetent advice should be prevented.

³³ *In re Brown*, Weiss & Wohl, *supra* note 3.

³⁴ Ohio Rev. Code Ann. § 4123.06 (Page Supp. 1963).

³⁵ See cases cited note 23 *supra*.

³⁶ *Goodman v. Beall*, *supra* note 18, at 429, 200 N.E. at 471.